

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1423

Cir. Ct. No. 2012CV239

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**FIRST NATIONAL BANK AND WHITE KNIGHT
COMMERCIAL FUNDING LLC,**

PLAINTIFFS,

V.

MICHAEL G. TREWIN,

DEFENDANT-APPELLANT,

DARRYEL E. HEARLEY AND MARY T. HEARLEY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oconto County:
MICHAEL T. JUDGE, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Michael Trewin, pro se, appeals a judgment granting Darryel and Mary Hearley rescission of a 2005 conveyance of real property to Trewin, based on Trewin’s breach of his fiduciary duties as the Hearleys’ attorney. Trewin argues the Hearleys’ rescission claim was barred by the applicable statute of limitations. We conclude the Hearleys’ claim was timely filed, pursuant to the continuing violation theory. We also reject Trewin’s argument that the circuit court erred by dismissing his counterclaim against the Hearleys for eviction. We therefore affirm.

BACKGROUND¹

¶2 The Hearleys are farmers residing in rural Oconto Falls, Wisconsin. From 1991 through at least 2010, Trewin had an attorney-client relationship with the Hearleys. During the course of that relationship, Trewin was involved in numerous financial transactions with the Hearleys.

¶3 For instance, in 1997, Trewin arranged for his brother-in-law, Daniel Schommer, and his friend, Jon Peotter, to loan the Hearleys \$290,000, at thirteen percent interest. The loan was secured by a mortgage on the Hearleys’ farm and

¹ In their appellate brief, the Hearleys rely in part on findings of fact that were made in September 2013 by the referee in an attorney disciplinary proceeding against Trewin. The circuit court also relied on the referee’s factual findings. Trewin appealed the referee’s report, and our supreme court determined the referee properly concluded Trewin had engaged in fourteen counts of professional misconduct, eight of which involved his representation of the Hearleys. *See Office of Lawyer Regulation v. Trewin*, 2014 WI 111, ¶¶2, 20, 358 Wis. 2d 310, 854 N.W.2d 357. In so doing, the court expressly stated it found “no basis to overturn any of the referee’s factual findings with respect to Attorney Trewin’s transactions with [the Hearleys].” *Id.*, ¶33.

In the current appeal, Trewin does not argue that either the Hearleys or the circuit court improperly relied on the referee’s findings of fact. Moreover, he does not allege any of the referee’s findings of fact are erroneous. Accordingly, we likewise rely in part on the referee’s factual findings.

homestead. The mortgage was subsequently assigned to Trewin and First National Bank.

¶4 Between June 1998 and May 2003, Trewin made approximately ten separate loans to the Hearleys, totaling \$99,663.50. In October 2003, Trewin prepared a promissory note between himself and the Hearleys, which was essentially a renewal of the 1997 loan at a lower interest rate. On May 7, 2004, Trewin loaned the Hearleys \$23,000. One week later, on May 14, the Hearleys signed a promissory note documenting a loan from Trewin in the amount of \$185,025.05. They also signed a conflict-of-interest waiver, which clarified that \$25,000 of the May 14 loan amount was “new money for paying off other loans,” and the remainder “was a refinancing of [the Hearleys’] current mortgage obligation” to Trewin.

¶5 On May 12, 2005, Trewin purchased 173 acres of land from the Hearleys for \$275,000. This was the same land that was subject to the 1997 mortgage that had been assigned to Trewin and First National Bank. It is undisputed that Trewin acquired the property for less than its fair market value. According to the Hearleys, Trewin told them they owed the IRS \$70,000, and if they sold Trewin their property, Trewin would “make the \$70,000 IRS obligation go away.” However, there is no evidence in the record that the Hearleys actually owed the IRS \$70,000. The Hearleys assert Trewin told them they would “get [their] property back” from him after one year. Although the Hearleys signed a conflict-of-interest waiver regarding the May 2005 sale, the circuit court found it “doubtful that the Hearleys had the ability to understand such a document.”

¶6 The record also includes an “Agricultural Lease w/ Option to Purchase” signed by Trewin and the Hearleys, with an “effective” date of June 1,

2005. Pursuant to that document, the Hearleys agreed to pay Trewin \$2,300 per month, for twenty months, to lease back the property they had sold him. Upon completion of the lease, the Hearleys had a one-year option to purchase the property for \$275,000, provided they were current on all lease payments.

¶7 Following the May 2005 sale, Trewin continued loaning money to the Hearleys. The record reflects that he loaned them \$20,000 in September 2006; \$20,362 in April 2007; \$1,580.60 in June 2007; and \$4,700 in August 2007. In June 2008, Trewin loaned the Hearleys \$125,000 “to refinance outstanding debt.” At the same time, Darryel Hearley signed an “Assignment of Dairy Income,” by which he agreed that \$4,000 per month of the Hearleys’ milk checks would be paid directly to Trewin. In July 2008, Trewin and the Hearleys entered into another “Agricultural Lease w/ Option to Purchase” regarding the property the Hearleys had sold to Trewin in May 2005.

¶8 In March 2009, Trewin sold for \$432,500 120 acres of the property he had purchased from the Hearleys. The Hearleys received \$110,926.17 from the proceeds of the March 2009 sale. Trewin testified this was to compensate the Hearleys for waiving their option to purchase the 120 acres. However, there is no evidence in the record regarding how the option to purchase was valued, whether the Hearleys agreed with the valuation, or whether Trewin discussed these matters with the Hearleys before the March 2009 sale.

¶9 On April 1, 2009, Trewin entered into a new lease with the Hearleys, whereby they agreed to rent the remaining fifty-two acres of the property Trewin had purchased from them in May 2005 for \$416.67 per month. The lease contained an option to purchase the property for \$50,000, but only if the Hearleys were current on their rent and had “no other debt to [Trewin] following executing

on this option.” After the new lease was signed in April 2009, Trewin continued to loan the Hearleys money: \$4,500 in May 2009; \$7,000 in July 2009; \$8,000 in January 2010; and \$2,500 in July 2010.

¶10 On July 9, 2010, the Hearleys filed a grievance against Trewin with the Office of Lawyer Regulation (OLR). The grievance stated:

In 2005, Attorney Trewin suggested we deed our property to him, in order to avoid an IRS tax lien. It was agreed that we would be able to repurchase the property by paying him \$3,000.00 per month, through a dairy assignment. In May of 2008, Mr. Trewin sold 120 acres of the property we had deeded to him for \$440,000.

Since 2005 and thru today’s date, we have requested an accounting of the funds, and have never been provided any information. We feel we have paid enough to Mr. Trewin to have the remaining property deeded back to us.

¶11 On August 4, 2010, the OLR wrote to Trewin asking for information related to the Hearleys’ grievance. Trewin subsequently called Darryel Hearley regarding the grievance. According to Darryel, Trewin was “ugly” on the phone and urged the Hearleys to meet with him. When the Hearleys met with Trewin, he asked them to sign an undated document, which read, “We have reviewed the closing statements and payment history provided by Michael Trewin, and agree with the amounts owed. We agree that the amount owed under the note is \$109,643.25, and we have an option to purchase the land for \$50,000.00.” The Hearleys did not know whether the amount stated in the document was accurate; nevertheless, they signed it because they “felt sorry for” Trewin.

¶12 Our supreme court ultimately revoked Trewin’s law license, after determining he had committed fourteen counts of professional misconduct, eight of which involved his representation of the Hearleys. *See Office of Lawyer Regulation v. Trewin*, 2014 WI 111, ¶¶2, 20, 358 Wis. 2d 310, 854 N.W.2d 357.

As relevant to this case, the court described the general pattern Trewin's conduct followed in his representation of the Hearleys and two other client couples:

The referee found that each of the three couples was financially unsophisticated, which caused them to rely on Attorney Trewin's recommendations.

Each couple initially retained Attorney Trewin when they were facing legal problems regarding their debts, either in the context of a foreclosure proceeding or a possible bankruptcy. Because of each couple's financial problems, they had difficulty obtaining loans in traditional credit markets—i.e., from banks, credit unions, etc.

Attorney Trewin usually loaned the couples money, often at relatively high interest rates (12–14%), starting with fairly small amounts and increasing the amount of the loans over time as the couples needed additional funds. The referee further found that because Attorney Trewin was not constrained by standard banking regulations, the clients did not receive many of the pieces of information and the warnings that they would have received when borrowing from traditional lenders. Moreover, there were many errors in the documentation of the loans and the tracking of payments.

....

Attorney Trewin's haphazard manner of handling these transactions left the clients confused about which loans were outstanding, what payments they had made toward which loans, and the balances of their loans.

The referee found that the clients usually did not negotiate with Attorney Trewin regarding their business transactions because they viewed him as their attorney. They relied on his expertise and judgment, and believed that he was acting in good faith and looking out for their best interests.

When the clients fell behind on their loan payments, Attorney Trewin's practice was not to telephone the clients, to deliver a notice of delinquency, or to sue the clients for eviction or a money judgment. The referee found that Attorney Trewin operated in this manner because he intentionally and consistently wanted to avoid judicial scrutiny of his conduct. Instead of attempting to enforce the terms of the existing notes and mortgages, Attorney Trewin's preferred course of action was to create another

loan to those clients. Often the new loan was a mixture of existing indebtedness and new money. When prior loans were paid off or replaced by a new loan, Attorney Trewin did not return the promissory notes for the prior loans.

Ultimately, when the couples had difficulties making their payments to Attorney Trewin or to another creditor, he would persuade the couple to transfer their property over to him, with the promise that he would lease the property back to them and they could reacquire the property if they were current on their payments to him and could also pay a specified amount to him for their property. The couples, however, were not in a financial condition where they could ever regain ownership of their property. Nonetheless, because of Attorney Trewin's actions, some couples continued to hold the mistaken belief that they really did retain ownership or control of the property even after they had transferred ownership of it to Attorney Trewin. In the end, Attorney Trewin ended up with the title to the clients' real property.

Id., ¶¶8-15 (footnote omitted).

¶13 At some point following his purchase of the Hearleys' property in May 2005, Trewin used that property as security for loans he obtained from First National Bank. In June 2012, First National Bank filed the instant lawsuit to foreclose a mortgage on the remaining fifty-two acres Trewin owned. The Hearleys were named as defendants in the foreclosure action, based on the bank's belief they had a potential interest in the property. In October 2012, the circuit court granted First National Bank a judgment of foreclosure, which was ultimately assigned to White Knight Commercial Funding, LLC.

¶14 A sheriff's sale was scheduled for April 23, 2013. However, on April 16, 2013, the Hearleys moved for a temporary injunction blocking the sale. On the same day, the Hearleys filed a cross-claim against Trewin, alleging that, over the course of his various transactions with them, Trewin took advantage of his position as their lawyer, thereby breaching his fiduciary duties to them and his

ethical obligations as an attorney. The Hearleys sought rescission of the May 12, 2005 deed conveying their property to Trewin or, alternatively, the imposition of a constructive trust over the property.

¶15 In response, Trewin asserted the Hearleys’ cross-claim was time barred under WIS. STAT. § 893.57 (2005-06), which imposed a two-year limitations period for intentional torts. Trewin argued the Hearleys “knew of the potential claim in July or August of 2010 at the latest, yet waited until April 16, 2013 to file” their cross-claim. Trewin also filed a counterclaim against the Hearleys for eviction.

¶16 Following a two-day trial, the circuit court concluded the Hearleys’ cross-claim was timely under the thirty-year limitations period in WIS. STAT. § 893.33(2) (2013-14), for actions concerning real property. The court further concluded rescission was warranted, under the circumstances, because Trewin had breached his fiduciary duties to the Hearleys. Finally, the court concluded Trewin could not prevail on his eviction counterclaim “due to the rescission” of the May 12, 2005 conveyance.

¶17 Trewin appealed, arguing the circuit court had erred by concluding WIS. STAT. § 893.33(2) (2013-14), was the applicable statute of limitations for the Hearleys’ cross-claim. We agreed, concluding: (1) the cross-claim was based on the Hearleys’ assertion that Trewin had breached his fiduciary duties to them; (2) breach of fiduciary duty is an intentional tort; and (3) intentional torts are “subject to the limitations period contained in WIS. STAT. § 893.57.” ***White Knight Commercial Funding, LLC v. Trewin***, No. 2014AP2246, unpublished slip op. ¶¶15-16 (WI App Sept. 30, 2015). We therefore reversed the judgment of rescission. However, we remanded for the circuit court to determine which

version of § 893.57 was applicable to the Hearleys’ cross-claim—the pre-February 2010 version, which set forth a two-year limitations period, or the post-February 2010 version, which set forth a three-year limitations period. *White Knight*, No. 2014AP2246, ¶¶19-20, 24-25; *see also* 2009 Wis. Act 120, §§ 1-2. We also directed the circuit court to consider on remand whether “the discovery rule, the continuing violation theory, or equitable estoppel apply so as to render the Hearleys’ cross[-]claim timely filed.” *White Knight*, No. 2014AP2246, ¶25.

¶18 Finally, we reversed the circuit court’s decision to dismiss Trewin’s eviction counterclaim, because that decision was based on the court’s conclusion “that any lease was extinguished by virtue of the rescission of the Hearleys’ May 12, 2005, conveyance to Trewin.” *Id.*, ¶28. We explained:

On remand, if the circuit court determines that the Hearleys’ cross[-]claim was timely filed, it shall enter a judgment ordering rescission, in accordance with its findings of fact and conclusions of law, and dismiss Trewin’s counterclaim for eviction. If, however, the court concludes the Hearleys’ cross[-]claim for breach of fiduciary duty was untimely, it will need to determine whether Trewin is entitled to relief on his eviction claim.

Id.

¶19 On remand, the circuit court held that, pursuant to the discovery rule, the Hearleys’ cross-claim did not accrue until sometime after they filed their OLR grievance because, “[p]rior to signing that grievance, there is no evidence that the Hearleys discovered or should have discovered that they had a claim against Trewin.” Alternatively, applying the continuing violation theory, the court held that the statute of limitations on the Hearleys’ cross-claim did not begin to run until Trewin’s violations ceased. In either case, the court concluded the Hearleys’ cross-claim was timely filed, pursuant to the three-year statute of limitations set

forth in the post-February 2010 version of WIS. STAT. § 893.57. The court also concluded that, under the circumstances, Trewin was equitably estopped from raising a statute of limitations defense.

¶20 Because it concluded the Hearleys’ cross-claim was timely filed, the circuit court, in accordance with our remand instructions in the previous appeal, entered a judgment rescinding the May 12, 2005 transfer of property from the Hearleys to Trewin. The court also dismissed Trewin’s counterclaim for eviction. Trewin now appeals.

DISCUSSION

¶21 Trewin argues the circuit court erred by concluding the Hearleys’ cross-claim was timely filed. He contends the cross-claim accrued in 2005 because, at that point, the Hearleys “knew all of the necessary facts to file a claim.” Trewin therefore argues the Hearleys’ cross-claim, which was not filed until April 16, 2013, was untimely under the two-year statute of limitations set forth in the pre-February 2010 version of WIS. STAT. § 893.57. *See* 2009 Wis. Act 120, §§ 1-2. We disagree. Instead, we conclude: (1) under the continuing violation theory, the Hearleys’ cross-claim did not accrue until September 2011, at the earliest; (2) the applicable limitations period is the three-year period set forth in the post-February 2010 version of § 893.57; and (3) the Hearleys timely filed their cross-claim within the three-year limitations period.²

² Determining which statute of limitations applies to an action is a question of law that we review independently. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2001 WI App 300, ¶14, 249 Wis. 2d 142, 638 N.W.2d 355. “Similarly, when the facts are undisputed, whether the applicable statute of limitations has run on a claim is a question of law.” *Munger v. Seehafer*, 2016 WI App 89, ¶18, 372 Wis. 2d 749, 890 N.W.2d 22.

¶22 As a general matter, “a cause of action accrues [for limitations purposes] when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it.” *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995). However, the continuing violation theory provides an exception to this general rule. Often employed in discrimination cases, the continuing violation theory provides that, where discriminatory practices are alleged to be continuing in nature, the timeliness of the plaintiff’s claim is determined based on when the last violation occurred. *Barry v. Maple Bluff Country Club*, 221 Wis. 2d 707, 726-27, 586 N.W.2d 182 (Ct. App. 1998). Thus, the continuing violation theory may allow a plaintiff to seek relief for an otherwise time-barred act “by linking it with an act that is within the limitations period.” *Id.* (quoting *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992)).

¶23 Notably, and contrary to Trewin’s assertion, Wisconsin courts have not limited application of the continuing violation theory to discrimination cases. For instance, in *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis. 2d 536, 539, 327 N.W.2d 55 (1982), our supreme court held that a cause of action for injuries from medical malpractice is timely if there is a continuing course of negligent treatment and any portion of that continuing course of negligent treatment falls within the limitations period. “The key is whether the negligent conduct is part of a continuum.” *Production Credit Ass’n of W. Cent. Wis. v. Vodak*, 150 Wis. 2d 294, 306, 441 N.W.2d 338 (Ct. App. 1989) (citing *Tamminen*, 109 Wis. 2d at 554). “Where the tort is continuing, the right of action is continuing.” *Tamminen*, 109 Wis. 2d at 554 (quoting *Hotelling v. Walther*, 130 P.2d 944, 946 (Or. 1942)). In other words, a “plaintiff [is] able to maintain [an] action for the entire negligent course of conduct even though some of the acts

of negligence, if considered separately and not a part of a continuum, would have been barred by the statute of limitations.” *Id.*

¶24 We agree with the circuit court that the continuing violation theory applies to the Hearleys’ cross-claim against Trewin. This case does not involve a single instance of an attorney defrauding his clients out of a piece of real estate. Rather, as demonstrated by the facts summarized above at paragraphs ¶¶2-11, this case involves a long-term scheme by an attorney to obtain information about financially unsophisticated and vulnerable clients, to gain those clients’ trust, and, ultimately, to use that trust to the attorney’s own financial benefit and to the clients’ detriment. The supreme court’s opinion in the attorney disciplinary proceedings against Trewin further supports a conclusion that Trewin engaged in a continuing course of conduct by which he breached his fiduciary duties to the Hearleys. *See supra* ¶12. Simply put, the breach that gave rise to the Hearleys’ cross-claim against Trewin was not limited to the single transaction that occurred on May 12, 2005.³

³ Trewin argues the continuing violation theory does not apply to the Hearleys’ cross-claim because, in cases involving fiduciary relationships, Wisconsin courts “have rejected the idea that the continuing violation theory tolls the statute of limitations.” However, the case Trewin cites in support of this proposition—*Production Credit Ass’n of West Central Wisconsin v. Vodak*, 150 Wis. 2d 294, 441 N.W.2d 338 (Ct. App. 1989)—does not support it.

In *Production Credit Ass’n*, we rejected the argument that “the mere existence of a fiduciary relationship tolls the running of a statute of limitations.” *Id.* at 304. We then determined that, under the facts of that case, the counterclaim plaintiffs had failed to establish that the defendant’s subsequent acts formed a continuum with its initial negligent act. *Id.* at 305-06. Contrary to Trewin’s assertion, we did not hold that the continuing violation theory never applies in cases involving claims for breach of fiduciary duty. Moreover, *Production Credit Ass’n* is distinguishable because, unlike in that case, the facts of this case *do* establish that the May 12, 2005 conveyance was part of a continuing course of conduct by Trewin.

¶25 We further agree with the circuit court that the course of conduct that gave rise to the Hearleys' cross-claim continued long after the May 12, 2005 transaction. After Trewin purchased the Hearleys' property on that date, he continued to loan them money, in part to "refinance" their existing debt to him. In addition, Darryel Hearley assigned a portion of the Hearleys' dairy income to Trewin in June 2008 as partial payment for the Hearleys' debt.

¶26 Moreover, even after the Hearleys filed their OLR grievance in July 2010, Trewin continued to take improper advantage of his fiduciary relationship with them. As noted above, when Trewin became aware of the Hearleys' grievance on August 4, 2010, he contacted them and asked them to sign a document he had drafted. The Hearleys signed the document, which stated they owed Trewin \$109,643.25, because they felt sorry for Trewin, despite the fact they had no idea whether the amount stated in the document was accurate. The record further indicates the document the Hearleys signed was incorrect, or at least incomplete, in its statement that the Hearleys had "an option to purchase the land for \$50,000.00." In fact, the Hearleys' option to purchase the property was contingent on the Hearleys being current on their rent and having no other outstanding debt to Trewin. In addition, the record shows that Trewin continued to receive payments from the Hearleys' milk checks until September 2011.

¶27 The above facts show that the course of conduct underlying the Hearleys' cross-claim for breach of fiduciary duty continued until at least September 2011, when Trewin received his final milk check payment. Accordingly, under the continuing violation theory, the Hearleys' cross-claim against Trewin accrued in September 2011, at the earliest.

¶28 This brings us to the question of which version of WIS. STAT. § 893.57 applies to the Hearleys’ cross-claim. As noted above, § 893.57 was amended in February 2010 to change the statute of limitations for intentional torts from two to three years. *See* 2009 Wis. Act 120, § 1. The amending act provides that the three-year limitations period “first applies to injuries occurring on the effective date of this subsection”—that is, February 26, 2010. *See id.*, § 2.

¶29 The facts summarized above show that the Hearleys sustained damages due to Trewin’s actions both before and after February 26, 2010. It is therefore appropriate to apply the amended, three-year limitations period to their cross-claim, particularly given our prior conclusion that, pursuant to the continuing violation theory, the Hearleys’ cross-claim did not accrue until at least September 2011. The Hearleys filed their cross-claim on April 16, 2013, less than three years after the earliest date on which it could have accrued. As a result, their cross-claim was timely filed under the amended version of WIS. STAT. § 893.57, and, consistent with our remand instructions in the previous appeal, the circuit court properly entered a judgment rescinding the May 12, 2005 conveyance.

¶30 Trewin argues the circuit court erred by dismissing his eviction counterclaim. He asserts he was entitled to relief on that claim based on his uncontroverted testimony that the Hearleys have not paid rent since 2010. However, in our decision in Trewin’s previous appeal, we observed the circuit court had dismissed the eviction counterclaim “because it concluded any lease was extinguished by virtue of the rescission of the Hearleys’ May 12, 2005, conveyance to Trewin.” *White Knight*, No. 2014AP2246, ¶28. Although we reversed the circuit court’s dismissal of the eviction counterclaim based on our conclusion the court had applied the wrong statute of limitations with respect to the Hearleys’ cross-claim, we instructed the court, on remand, to once again enter

a judgment dismissing the counterclaim if the court determined the Hearleys' cross-claim was timely under the correct statute of limitations. *Id.* Trewin does not develop any argument on appeal that, even if the circuit court properly found the Hearleys' cross-claim timely on remand, it nevertheless erred by dismissing his eviction counterclaim. We therefore affirm the court's decision to dismiss the counterclaim.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under RULE 809.23(3)(b) (2015-16).

